SUPREME COURT, U. S.

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FILED
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JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES
OF AMERICA

1967

No. ~~1363~~ 136

ANGELO MINICHIELLO,

Petitioner,

against

ROYAL BUSINESS FUNDS CORP.,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE COUNTY OF NEW YORK, TO REVIEW AN ORDER AND DECISION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

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INDEX TO APPENDIX

	PAGE
Order of Remittitur of New York Court of Appeals ..	1a
Opinion of the New York Court of Appeals	4a
Order Denying Reargument	9a
Order of Appellate Division Adopting Order of New York Court of Appeals	10a
Original Opinion in Special Term	16a
Original Opinion in Appellate Division	12a

No. 428

Order of Remittitur of New York Court of Appeals.

Court of Appeals

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 30th day of December in the year of our Lord one thousand nine hundred and sixty-six, before the Judges of said Court.

WITNESS,

THE HON. CHARLES S. DESMOND,
Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

REMITTITUR December 30, 1966.

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1. No. 428. 66

ANGELO MINICHIELLO & ano.,
Respondents,

vs.

ROYAL BUSINESS FUNDS CORP.,
Appellant,

SMALL BUSINESS INVESTMENT CO. OF NEW YORK, INC., & ano.,
Defendants.

BE IT REMEMBERED, That on the 6th day of October in the year of our Lord one thousand nine hundred and sixty-

six, Royal Business Funds Corp., the appellant in this cause, came here unto the Court of Appeals, by Ryan, Temkin & Ginsberg, its attorneys, and filed in the said Court a return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Angelo Minichiello & ano., the respondents in said cause, afterwards appeared in said Court of Appeals by Lewis, MacDonald & Varian, their attorneys.

Which said return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Bruce Bromley, of counsel for the appellant, and by Mr. Edward F. Butler, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court herein be and the same hereby is reversed, with costs in this Court and in the Appellate Division, and the matter remitted to Special Term for further proceedings in accordance with the opinion herein. Question certified answered in the negative.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, First Judicial Department, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be reversed, with costs &c. Question certified answered in the negative, as aforesaid.

And hereupon, as well the return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court,

Order of Remittitur of New York Court of Appeals.

First Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division, before the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals of
the State of New York.

Court of Appeals, Clerk's Office,
Albany, December 30, 1966.

(SEAL)

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON,
Clerk.

Opinion of the New York Court of Appeals.

ANGELO MINICHIELLO et al., Respondents v. ROYAL BUSINESS FUNDS CORPORATION, Appellant, et al., Defendants.

Decided December 30, 1966.

KEATING, J. Angelo Minichiello alleges in his complaint that, between September, 1963 and March, 1964, he performed certain services for appellant Royal Business Funds Corporation (Royal) and defendant Small Business Investment Company of New York (SBIC).

As alleged in Mr. Minichiello's complaint, Royal and SBIC had become the owners of "a substantial amount of the convertible debentures issued by Colorama Features, Inc." After a default by Colorama in September, 1963, plaintiff alleges that, at the request of defendants Royal and SBIC, he found a purchaser (the defendant Jayark Films Corporation), who bought from them, the convertible debentures of Colorama as well as certain Colorama stock.

Plaintiff claims from Royal $25,000 for these services as well as $5,000 for finding defendant Jayark as a source of investment for defendant Royal. Plaintiff has no written memorandum of his alleged contract with defendants.

Royal moved to dismiss Minichiello's complaint on the ground that his action is barred by the Statute of Frauds (General Obligations Law, § 5-701). The Appellate Division affirmed Special Term's denial of this motion, Justice STEUER dissenting (25 A D 2d 502).

The issue thus presented on this appeal is whether the order of Special Term denying appellant's motion to dismiss on the ground that this action is barred by the Statute of Frauds was properly made.

As enacted in 1949, subdivision 10 of section 31 of the Personal Property Law, now contained as amended in the General Obligations Law (§ 5-701, subd. 10), applied the

Statute of Frauds to any agreement which: "Is a contract to pay compensation for services rendered in negotiating a loan, or in negotiating the purchase, sale, exchange, renting or leasing of any real estate or interest therein, or of a business opportunity, business, its good will, inventory, fixtures or an interest therein, including a majority of the voting stock interest in a corporation and including the creating of a partnership interest".

This section was subsequently construed by lower courts to permit recovery, despite the absence of a writing, in *quantum meruit.* (See *Gibson* v. *Archer Prods.*, 281 App. Div. 661 [1st Dept., 1952]; *Wells* v. *Dent*, 4 A D 2d 307 [4th Dept., 1957].) The section has also been construed to be inapplicable to business "finders" as opposed to brokers. (See *Wells* v. *Dent, supra; Kuffler* v. *List*, 144 F. Supp. 776 [S. D. N. Y., 1956].) Our court has never passed on either question.

In 1964, the Legislature amended subdivision 10 to clearly apply the section to finders and to preclude any recovery in *quantum meruit.* The amended section thus provides " 'Negotiating' includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction. This provision shall apply to a contract implied in fact or in law".

Since plaintiff's cause of action accrued before the effective date of the amendment, it is necessary for us to construe the meaning of subdivision 10 of section 31 of the Personal Property Law as it was enacted in 1949, and before the passage of the 1964 amendment.

In recommending the amendment to subdivision 10 of section 5-701, the Law Revision Commission characterized it as a clarification of the *original* intent of the 1949 Legislature, stating with respect to the amendment: "Its purpose is to make clear that the contracts required to be evidenced by writing include a contract or agreement

for the compensation of a business broker for acting as a 'finder', 'originator' or 'introducer,' or for assisting in the negotiation or consummation of the transaction, and that the requirement cannot be avoided by an action for compensation in quantum meruit." (N. Y. Legis. Doc., 1964, No. 65[F].)

Although, undoubtedly, the 1964 Law Revision Commission cannot conclusively determine the intent of the 1949 Legislature, the above statement of the commission constitutes a declaration of its own intent in proposing the statute, which has some bearing on the legislative intent in enacting the proposed section.

The briefs for each side have considered at some length various sources of legislative history surrounding the enactment of subdivision 10 of section 31.

The Law Revision Commission's recommendation to the 1949 Legislature failed to consider, explicitly, the two issues: (1) whether recovery could be had in *quantum meruit* and (2) whether the statute was to apply to finders.

Accordingly, appellant has stressed the study prepared at the direction of the commission by Professor Braucher of Harvard, which did consider these issues, and respondent has correspondingly urged that the study should be accorded no weight.

Although a study like this is entitled to some weight in determining the legislative intent particularly where it accompanies the commission's report to the Legislature, the intention of the Legislature in this case can be far better perceived by examining the purpose of the statute.

In its brief recommendation to the Legislature, the Law Revision Commission stated its reason for proposing subdivision 10 of section 31: "In recent years there have been a substantial number of reported cases of claims for commissions for services rendered in the sale of a going business or a business opportunity. Under existing law

there is no requirement that business brokers' contracts for commissions be in writing. The nature of the transactions is such that, in the absence of the requirement of a writing, unfounded and multiple claims for commissions are frequently asserted, and employers often seek to escape liability by denying the fact of employment. These controversies are commonly resolved by juries on conflicting testimony, with the consequent danger of erroneous verdicts'' (1949 Report of N. Y. Law Rev. Comm. [N. Y. Legis. Doc., 1949, No. 65 (G), p. 615]).

Thus, the commission believed that the ''danger of erroneous verdicts'' in allowing a jury to determine this type of case on oral testimony warranted the writing requirement.

The nature of the services rendered by business brokers and finders is such that a demand for payment is not usually made until they have completed their services. Thus, to allow recovery for the reasonable value of these services is to substantially defeat the writing requirement.

We should not ascribe to the Legislature such a paradoxical purpose.

Similarly, if the Legislature intended to avoid erroneous verdicts in this type of case, exclusion of finders from the operation of subdivision 10 of section 31 would be inexplicable.

If, indeed, there is any definite distinction between finders and brokers, it would probably be in the quantity of services rendered by each. It is possible for a finder to accomplish his service by making only two phone calls and, if the parties later conclude a deal, he is entitled to his commission. But the difficulty in proving services ordinarily varies in an inverse proportion to the amount of services rendered.

Thus, to include brokers and to exclude finders from the statute is to permit oral testimony in the very cases which are the least susceptible to oral proof.

Accordingly, we conclude that the 1949 Legislature intended to include finders within the operation of subdivision 10 of section 31 and to preclude any recovery in *quantum meruit*.

Respondent has contended that, even if we interpret subdivision 10 of section 31 in this way, his case nevertheless falls without the operation of the statute. This he bases on the following language of the section, applying it to contracts to pay for services rendered: "In negotiating the purchase, sale * * * of a business opportunity, business, its good will, inventory, fixtures or an interest therein, including a majority of the voting stock interest in a corporation".

Respondent argues that since appellant Royal sold only at most 50% of the voting stock of Colorama, while SBIC sold the remainder, he did not negotiate the sale of a "majority of the voting stock interest", within the meaning of the statute.

This argument is without substance. The phrase "including a majority of the voting stock interest" in no way limits the application of the preceding language. To apply the provision only when a single seller owns a majority stock interest would be contrary to the intent of the Legislature and the plain meaning of the statute.

The order should be reversed, with costs, and the certified question answered in the negative.

Chief Judge DESMOND and Judges FULD, VAN VOORHIS, BURKE, SCILEPPI and BERGAN concur.

Order reversed, with costs in this court and in the Appellate Division, and matter remitted to Special Term for further proceedings in accordance with the opinion herein. Question certified answered in the negative.

Order Denying Reargument.

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Second day of March, A. D. 1967.

Present, HON. STANLEY H. FULD, Chief Judge, presiding.

Mo. No. 244

ANGELO MINICHIELLO,

Respondent,

STANTON L. PRESSMAN,

Plaintiff,

v.

ROYAL BUSINESS FUNDS CORP.,

Appellant,

SMALL BUSINESS INVESTMENT CO. OF NEW YORK, INC., and JAYARK FILMS CORP.,

Defendants.

A motion for reargument of the above cause having heretofore been made upon the part of the respondent herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with ten dollars costs and necessary reproduction disbursements.

A copy.

GEARON KIMBALL,
Deputy Clerk.

(SEAL)

Order of Appellate Division Adopting Order of New York Court of Appeals.

At a term of the Appellate Division of the Supreme Court of the State of New York, held in and for the First Justice Department in the County of New York, on the 20th day of February, 1967.

Present: Hon. Bernard Botein,
Presiding Justice.
Hon. Harold A. Stevens,
Hon. Aron Steuer,
Hon. Louis J. Capozzoli,
Hon. George Tilzer,
Justices.

Angelo Minichiello and Stanton L. Pressman,

Plaintiffs-Respondents,

against

Royal Business Funds Corporation,

Defendant-Appellant.

The above-mentioned Defendant-Appellant, Royal Business Funds Corporation, having appealed to the Court of Appeals from the Order of the Appellate Division of the Supreme Court, First Department, entered on the 3rd day of February, 1966, in the Office of the Clerk of said Court, which affirmed an order of the Supreme Court entered on the 29th day of June, 1965, which denied the motion of said Defendant-Appellant to dismiss the complaint. Leave to

Order of Appellate Division Adopting Order of New York Court of Appeals.

appeal to the Court of Appeals was granted by order entered in the office of the clerk on July 12, 1966 and the following question of law certified:

> "Was the order of Special Term entered June 29, 1965, denying as a matter or law Appellant's motion to dismiss Respondent's complaint on the ground that his claim is barred by General Obligations Law Section 5-701(10) (formerly Personal Property Law Section 31(10)) affirmed by order of this Court filed in the Office of the Clerk on February 3, 1966, properly made?"

and said Defendant-Appellant having appealed to the Court of Appeals pursuant to said order and said appeal having come on to be heard before the said Court of Appeals and the said Court of Appeals having heard this cause argued by Bruce Bromley, of counsel for Defendant-Appellant, and by Edward F. Butler, of counsel for Plaintiff-Respondent, and after due deliberation had thereon and the Court of Appeals having ordered and adjudged that the order of the Appellate Division appealed from be reversed, with costs in this Court and in the Appellate Division, and the matter remitted to Special Term for further proceedings in accordance with the opinion herein, and the certified question being answered in the negative and it being further ordered that the record and the proceedings in this Court be remitted to the Appellate Division of the Supreme Court, First Judicial Department, there to be proceeded upon according to law, it is

ORDERED that said order of the Court of Appeals dated the 30th day of December, 1966 be and the same hereby is made the order of this Court.

Enter:

s/ HAROLD A. STEVENS

Original Opinion in Appellate Division.

(February 3, 1966)

ANGELO MINICHIELLO et al., Respondents, v. ROYAL BUSINESS FUNDS CORPORATION, Appellant, et al., Defendants.

APPEAL from an order of the Supreme Court at Special Term, entered June 29, 1965 in New York County, which denied a motion by appellant for an order dismissing the complaint.

MEMORANDUM BY THE COURT. Order, entered on June 29, 1965, appealed from affirmed, with $50 costs and disbursements to respondents. The facts are sufficiently set forth in the dissenting opinion so it is unnecessary to repeat them here, the single question being, as indicated, whether the Statute of Frauds is a complete defense to the action and as such warrants a dismissal of the complaint. We are in agreement that if the cause of action alleged had arisen subsequent to the amendment of subdivision 10 of section 31 of the Personal Property Law as reconsolidated and transferred to the General Obligations Law (§ 5-701) that the action could not be maintained. However, it has been held under the old section 31 of the Personal Property Law, prior to the amendment and its transfer to the General Obligations Law, that while the Statute of Frauds might be a bar to an action brought on an express contract, it would not constitute a defense to an action brought in *quantum meruit* to recover for services rendered. (*Gibson* v. *Archer Prods.*, 281 App. Div. 661 [1952]; *Wells* v. *Dent*, 4 A D 2d 307, 309 [1957].)

STEUER, J. (dissenting). While the complaint alleges causes of action against several defendants, only those against the moving defendant are considered. And though there are two plaintiffs, only one alleges causes of action against this defendant.

Plaintiff sues for the reasonable value of the services rendered in procuring an investment opportunity, namely, the purchase of all of the stock of a corporation. No writing evidencing the hiring is claimed. The question presented is whether the Statute of Frauds is a complete defense to the action.

It is indisputable that suit on an agreement to perform these services not substantiated by a memorandum in writing would not be actionable (General Obligations Law, § 5-701, subd. 10).* In 1964, admittedly after the date these actions arose, the statute was amended to include the following language: "This provision shall apply to a contract implied in fact or in law to pay reasonable compensation". It is therefore not open to dispute that under the existing law this action could not be maintained. Of course, the fact that the statute so provides at this time would not affect the disposition of this action if the statute constituted a change in the law. But the statute effected no change at all. It merely clarified the existing law, and its purpose was to remove any ground for a contrary contention (See N. Y. Legis. Doc., 1964, No. 65[F]).

It must be apparent that in the original enactment in 1949 (Personal Property Law, § 31, subd. 10), the evil that the Legislature sought to avoid was the bringing of unfounded claims for finding or procuring business opportunities. That is the purpose of all statutes requiring a degree of proof greater than the sworn word of the claimant. It is patent that this purpose would be frustrated if the claimant could maintain his action by merely changing the allegations from an oral contract to one implied in fact or law. It is also beyond dispute that the proposers of the 1949

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* At the time this cause of action arose, the applicable statute was contained in subdivision 10 of section 31 of the Personal Property Law.

statute understood that the statute precluded such actions. "Regardless of the form, it seems now to be uniformly held that the broker's full performance does not entitle him to recover commissions without complying with the statutory requirement of a memorandum. Nor may he recover the reasonable value of his services on a theory of unjust enrichment." (N. Y. Legis. Doc., 1949, No. 65 [G], p. 21; 1949 Report of N. Y. Law Rev. Comm., pp. 629-630.)

It is undoubtedly true that the wording of the statute before the amendment led to some decisions which ran counter to the expectations of the Legislature as expressed by the Reports of the Law Revision Commission. It would be useless to analyze each of those. It is sufficient to say that none of the opinions refers to the legislative intent, and the sources of it were apparently not examined. In the sole instance discovered where this was done, an exactly opposite conclusion was revealed, namely, that the statute did provide a bar to an action in *quantum meruit* (*Graymount* v. *Schlemmer*, 204 Misc. 667).*

While a clarifying amendment does not change the existing law, it is of material assistance in determining what the law was even prior to the amendment. "It is, of course, true that the Legislature cannot come back a year later and, by a new law, control the interpretation of the law it passed a year earlier. However, we held, almost a century ago, that, when the Legislature does tell us what it meant by a previous act, its subsequent statement of earlier intent is entitled to very great weight". (*Matter of Chatlos* v. *McGoldrick*, 302 N. Y. 380, 388, DESMOND, Ch. J.) According the legislative intent as expressed in the clarifying

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* The decision was affirmed in this court (283 App. Div. 859), but the memorandum opinion indicates that this court did not find it necessary to reach the question, holding that plaintiff's proof to support *quantum meruit* was insufficient.

statute the weight it was entitled to resulted in a holding that the original statute had the same meaning as the clarifying statute—as it did in several other instances. (For a collection of such instances, see *Leighton* v. *Bearman*, 278 App. Div. 72.) Applying the rule to the instant case precludes recovery.

The order should be reversed and the motion granted dismissing the complaint against the moving defendant.

Breitel, J. P., Valente, McNally and Stevens, JJ., concur in Memorandum; Steuer, J., dissents in opinion.

Order affirmed, etc. [47 Misc 2d 310.]

Original Opinion at Special Term.

ANGELO MINICHIELLO et al., Plaintiffs, *v.* ROYAL BUSINESS FUNDS CORPORATION et al., Defendants.

Supreme Court, Special Term, New York County, June 28, 1965.

FREDERICK BACKER, J. Defendant Royal Business Funds Corporation moves for dismissal of the complaint upon the ground that the Statute of Frauds bars its maintenance. It is the named defendant in the first and second causes asserted on behalf of plaintiff Minichiello. Each is in *quantum meruit* and the alleged services were rendered in the period September 1, 1963 to March 31, 1964. Defendant relies on the basic fact undisputed on this motion that the subject matter is not covered by any writing and upon the basic legal argument that subdivision 10 of Section 5-701 of the General Obligations Law (as amd. by L. 1964, ch. 561) effective September 27, 1964 is applicable and maintenance of those causes is therefore barred.

The argument is that subdivision 10 of section 31 of the Personal Property Law was intended at the time of its enactment in 1949, to bar causes in *quantum meruit,* that subdivision 10 of section 5-701 was enacted to say so, that the error into which the courts had fallen in so construing Personal Property Law that maintenance of suits in *quantum meruit* was permissible, should not be continued.

The intent of the later enactment is to be discovered, says the defendant from the Law Revision Commission memorandum (N. Y. Legis. Doc., 1964, No. 65 [F]), which stated: "In recommending the statute, the Commission relied on a uniform current of authority, under similar statutes in other states, denying such claims on the ground that 'the application of the rule which permits recovery upon quantum meruit to the case of real estate brokers absolutely nullifies these statutes.' Hale v. Kreisel, 194

Wis. 271, 215 N. W. 227 [1927], quoted in Leg. Doc. [1949] No. 65 [G], p. 22. The Commission therefore recommends an amendment to make clear that no recovery on a quantum meruit theory was intended."

Of course, the question of intent is one for the court to determine in any judicial proceeding and in *Harmon* v. *Peats Co.* (243 N. Y. 473, 476) the Court of Appeals stated: "Treating the action as one to recover on *quantum meruit*, the Statute of Frauds could not apply." Nullification could refer to a proper legal construction by which a statute is found not to be sufficiently broad in its coverage to attain a claimed goal, or to a disregard of statute and its proper construction in the light of evidence of its intention. The same memorandum states: "This is an amendment recommended by the Law Revision Commission. See Leg. Doc. (1964) No. 65 (F). Its purpose is to make clear that the contracts required to be evidenced by writing include a contract or agreement for the compensation of a business broker for acting as a 'finder', 'originator' or 'introducer' or for assisting in the negotiation or consummation of the transaction, and that the requirement cannot be avoided by an action for compensation in quantum meruit." (L. 1964, Vol. 2, p. 1533 n.) It is then argued that: "Where there occurs an overruling of a judicial decision the effect is usually one of application of the new rule to past events." This begs the question whether a decision was overruled and whether retroactivity was intended. Certainly, the latter is not made expressly to appear. In support of its position, defendant alludes again to the Law Revision Commission memorandum on the 1964 statute and to the reference therein to the 1949 Legislative Document No. 65 (G) where it was stated at page 615: "Under existing law there is no requirement that business brokers' contracts for commissions be in writing. The nature of the transactions is such that, in the absence of the requirement

of a writing, unfounded and multiple claims for commissions are frequently asserted, and employers often seek to escape liability by denying the fact of employment. These controversies are commonly resolved by juries on conflicting testimony, with the consequent danger of erroneous verdicts." And at page 621: "The basis for the suggestion" (that claims for commissions on business loans or sales be in writing) "was a feeling that the absence of such legislation permitted business men to be harrassed by unfounded claims for commissions on transactions where they had not intended to engage any agent, or had not intended to engage the agent making the claim." The proposal for enactment of subdivision 10 of section 31 of the Personal Property Law is thus seen to bar contract commission actions unless in writing; and with the emphasis on contract actions, the intention is not made manifest that suits in *quantum meruit* were barred.

It must be concluded, therefore, that the courts did not misconstrue; that judicial ruling was not overruled; and that the 1964 enactment was truly an amendment. It was not made retroactive. The motion for dismissal is denied.